(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 398

LIEUT. WILLIAM DOWNEY, U. S. A., ET AL.,
Petitioners,

vs.

THE HON. DWIGHT H. GREEN, EX OFFICIO IN THE CAPACITY HEREINAFTER DESIGNATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT DWIGHT H. GREEN IN OPPOSITION TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

Summary of Argument.

The defendant contends that, since only jurisdictional questions were presented to the lower courts, only jurisdictional questions are before this court. Although this court may, in its discretion, review points actually presented but not passed upon by lower courts, it may not properly review questions which were not even presented on the pleadings below.

The defendant contends that the suit is in effect one against the State of Illinois and is forbidden by the doctrine of sovereign immunity.

But if it is suggested that the suit is not against the State of Illinois and that the Governor does not represent the state, then the suit should be dismissed because, although the suit is one to affect action of the state government, the state government is not represented and has had no chance to be heard. Therefore the court lacks jurisdiction because of the absence of indispensable parties.

It is contended that, if a declaratory judgment would be binding upon the state, the suit offends Illinois' *immunity;* but if such judgment would not be binding, then it would be merely hortatory and there is "no case or controversy."

Although the defendant earnestly maintains that this court cannot decide the plaintiffs' question of election law, since that question was not before the lower courts upon objection going purely to jurisdiction, nevertheless the defendant contends that, if this court can pass upon the merits, it should hold that it is the unmistakable intent of Congress that the Governor's certification, and not a judicial judgment or decree in lieu of such certification, is a prerequisite to the use of the soldiers' ballots in the State of Illinois.

List of Authorities Cited.

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REFERENCE TO JUDGMENT OF THE DISTRICT COURT AND JUDGMENTS OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS.

Neither the District Court's opinion and judgment nor the memorandum opinion and judgment of the Circuit Court of Appeals has been officially reported. The judgment of the District Court, which dismissed the suit at the plaintiffs' cost, will be found at page 45 of the transcript. The memorandum opinion of the Circuit Court of Appeals will be found at page 68 of the transcript and, since it is only eleven lines long, is reprinted in the margin here for the immediate convenience of this court.[1]

1. "*Per Curiam.* The complaint seeks a declaratory judgment (under Title 28, Sec. 400, U. S. C. A.) to determine plaintiffs' rights under the Federal War-time Voting Act of 1944. 50 U. S. C. A. Sec. 301, *et seq.*
"The defendant entered a special appearance and moved to dismiss the alleged cause of action for lack of jurisdiction ever both the defendant and the subject matter of the complaint. The Court sustained the motion and dismissed the complaint, and from that ruling this appeal is prosecuted.
"The judgment is affirmed without opinion."

STATEMENT OF THE CASE.

The plaintiffs, three men in the armed forces of the United States, sought by this proceeding, which asserted federal jurisdiction over the cause as a civil rights case under the declaratory judgment act, to elicit a pronouncement by the District Court to the effect that (1) Title 3 of the Federal War-time Voting Act of 1944 [2] was valid and constitutional, (2) that the act grants a right to vote which is superior to any right to vote granted by any laws of Illinois and that such right to use and to vote such ballots in no way depends upon the laws of Illinois, (3) that the use of the official Federal War-time ballots for which the act provides is authorized by the laws of the State of Illinois in so far as the laws of that state have any application to the use of Federal War-time ballots, (4) that it is the duty and obligation of the defendant, "*ex officio* and as Governor of the State of Illinois," forthwith and without further delay, to certify to the United States War-time Ballot Commission that the use of the said official Federal War-time ballot is authorized by the laws of the State of Illinois at the election last mentioned, (5) that the requirements of such certification be made "prior to July 15th of the year in which the election is to be held" is not mandatory, and (6) finally, that if the Governor fails and refuses to make such certification, or if he attempts to certify that the use of such ballot is not authorized by the laws of Illinois, then the official Federal War-time ballots "shall be valid and lawful in the State of Illinois" for the coming Presidential and Congressional elections notwithstanding the Governor's failure to certify. (Tr. 25-27.)

2. Public Law 277, Chap. 150, Laws of the 78th Congress, 2nd Session.

The defendant filed a special, limited and restricted appearance (Tr. 37) and his motion, under such special appearance, to dismiss the cause for want of jurisdiction. By this motion, the defendant asserted in substance that:

(1) The suit seeks and contemplates an adjudication which, if such an adjudication could be entered and given effect, would "affect, determine, decide, conclude or adjudicate a question directly affecting, relating to and governing an election to be held in the State of Illinois;" and that, therefore, the suit is, in substance and essential virtue, one against the State.

(2) The suit seeks a declaration or adjudication that would be void unless it were binding not only upon the defendant but upon all persons authorized or directed by law to issue, receive, count, tabulate the result of counting and otherwise deal with ballots cast or sought to be cast in the coming elections; such persons would not be bound by an adjudication against the defendant; and therefore jurisdiction is lacking because of the absence of indispensable parties.

(3) The subject matter of the cause does not constitute a case or controversy within the provisions of the Constitution of the United States authorizing the conferment of jurisdiction upon Federal courts over cases and controversies at law or in equity.

(4) The Governor of the State of Illinois is immune to suits or judicial process having for their object either the actual compulsion of the performance of supposed duties resting upon him, either as Governor or in any capacity, *ex officio*, appertaining to the office of Governor, or for the purpose of usurping his functions as such Governor under the pretext of determining what he should or ought to do.

(5) The right to vote cannot be protected or enforced by any proceeding known to law or equity. Therefore

Congress neither intended to nor could confer jurisdiction upon federal courts to determine such rights by declaratory judgment; for aside from the fact that proceedings seeking a moot pronouncement as to the right do not embody a case or controversy at all, they certainly do not embody a case or controversy "known to the common law or equity."

Although the plaintiffs seek to litigate in this court substantive merits of their contention that the congressional act in question confers a right upon the plaintiffs and other service men from Illinois which is not dependent upon either legislative or gubernatorial action, the only issues precipitated by the defendant's pleadings and the only questions before the lower courts or before this court are the jurisdictional questions relating to whether the Governor is amenable to a declaratory judgment in this case.

ARGUMENT.

(A SUMMARY OF ARGUMENT APPEARS IMMEDIATELY FOLLOWING THE INDEX.)

INTRODUCTION.

The entire petition and brief of the plaintiffs are addressed to what their counsel conceive to be a substantive question of the right of persons in military service to vote at the coming elections.

But the only points raised by the defendant's motion to dismiss, which was presented upon special and limited appearance, were that the court lacked jurisdiction of the subject matter and of the parties for the reasons summarized in the foregoing Statement of the Case and hereafter considered. These points asserted the defendant's contentions, *first*, that, notwithstanding the plaintiffs' protestations to the contrary, this proceeding is in substance and essential virtue a suit against the State of Illinois, *second*, that since the suit affects Illinois elections, the officials sought to be bound by the judgment must be made parties to the suit, it being impossible to regard the Governor as representing the state government for the purpose of dispensing with election officials as parties and at the same time regard him as **not** representing the state government for the purpose of holding the suit to be one not against the state and its government, and *third*, that, apart from all questions of state immunity, the rights sought to be asserted are not those which could be the subject of any proceeding at law or in equity (except perhaps a damage suit against individuals who might interfere with the right to vote but who are not parties to this case), wherefore the proceeding is not a suit at law

or in equity and is not within the cognizance of federal courts.

It is the position of the defendant in this court that the jurisdictional questions raised the only issues that could have been passed upon by either of the lower courts or that can be considered here. We are mindful of the rule that, where a litigant asserts several independent and alternative contentions as grounds for a decision in his favor and the trial court, having sustained one of such contentions, therefore finds it unnecessary to pass upon other contentions, this court may, in its discretion, either review only the question decided below or may pass upon other contentions. In other words this court may decide a case upon grounds **present in the record but not passed upon by the lower courts** or, alternatively and in its discretion, if it does not affirm upon the only ground or grounds considered below, it may remand the case for consideration of the questions which, **though present**, the lower court deemed it unnecessary to decide.

But the existence of this court's discretion either to consider questions not dealt with below or, if it decides adversely the question which was decided below, to remand the cause for decision of the questions previously not considered **presupposes that the questions were properly before the lower courts and could have been decided by them.**

Now, in this case, the defendants' pleading was a motion to dismiss for want of jurisdiction under a special appearance. The defendant filed no other pleadings and did not encounter or engage the plaintiffs in any issue, of law or fact, as to the merits. Only two judgments could have been rendered. One was the judgment that was actually rendered, that is, a judgment sustaining the motion to dismiss the cause for want of jurisdiction. The other was a judgment, not upon the merits but in the nature of *respondeat ouster.* **The trial court could not have passed upon the substantive merits of the election question upon the pleadings before it.**

The most that it could have done would be to grant the defendant leave to file a motion in the nature of a demurrer to the merits or an answer. In other words, the defendant's admission of the facts pleaded was made for the purpose of testing the court's jurisdiction to decide the substantive questions sought to be presented and not for the purpose of eliciting a decision upon the merits.

For example, had the defendant's motion to dismiss been overruled, the plaintiffs would not have been entitled to a judgment on the merits but the defendant would have been given an opportunity to file an answer. Since he has no actual knowledge of many of the facts averred in the complaint, among others, the alleged fact that the plaintiffs are in the country's military service, the right to file such an answer and demand proof of that fact would be an important one.

Therefore the merits of the case were not before the District Court and could not have been decided by it. The District Court having dismissed the case for want of jurisdiction, it follows that upon appeal, the Circuit Court of Appeals could not properly have passed upon any question of the substantive merits. And it likewise follows that, although this court may, in its discretion, decide questions which were **presented** in the lower courts **but not passed upon**, it may not and should not decide questions which not only were not passed upon **but which could not have been passed upon because they were not presented.**

Suggestion in the nature of a motion that certiorari be denied for failure to present and argue the only questions properly involved.

Since the only questions before this court are jurisdictional questions and since the only questions discussed in the plaintiffs' petition and brief are questions pertaining

to the substantive merits of the case, we submit and suggest that this court might properly deny *certiorari* if for no other reasons than that the plaintiffs have failed to treat, argue or even discuss the *only* questions presented on the record.

At this point, we submit the suggestion, in the nature of a motion, that this court dismiss this petition for failure to consider the only questions properly involved.

If, however, that suggestion be not acted upon favorably to the defendant, then we present the considerations developed in this argument upon the questions of jurisdiction.

I.

The suit is in substance one against the State of Illinois.

It is unnecessary to collate and consider extensively the numerous authorities sustaining the general propositions (1) that a state is immune to suit in the federal courts, even by her own citizens (see *Hans* v. *Louisiana*, 134 U. S. 1) and that, when the object of a suit is actually to affect the sovereignty, it is without the jurisdiction of the federal courts even though it is brought in form against a governor or other state officer and not against the state and is not entitled against the state (see *Governor of Georgia* v. *Madrazo*, 26 U. S. 110; *Kentucky* v. *Dennison*, 65 U. S. 66; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, and *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446); for the plaintiffs do not question these premises in their abstract genericity as fundamental precepts of constitutional law and basic doctrines of sovereign immunity.

The plaintiffs, however, seek to avoid the import of these principles in the present case by asserting in their complaint and in their arguments that the defendant is sued,

not as Governor in the ordinary sense, but, in the language of plaintiffs' counsel, "*ex-officio*, in the capacity hereinafter designated." Although the plaintiffs do not designate the "*ex-officio* capacity" by any specific title, it is their theory that the Federal War-Time Voting Act imposes *federal* duties upon the Governor, as a *federal* functionary. They therefore seek to derive a principle that he is subject to federal process without infringement of sovereign immunity.

Now this precise contention has been passed upon adversely to the plaintiffs by this court in the case of *Kentucky* v. *Dennison*, 65 U. S. 66, already cited *ante* in support of the general proposition that suits against the Governor in his official character are in effect suits against the state. We now examine it in its specific application to the facts of the case at bar.

In that case, the State of Kentucky brought a suit against Dennison, who was the Governor of Ohio, to compel the latter to render to Kentucky a fugitive who had found asylum in Ohio from Kentucky's criminal law. The criminal act with which the fugitive was charged related to slavery. Dennison refused to honor the extradition warrant.

It appears, not from the opinion of the court, but from the argument of counsel, reproduced at page 80 of the official report, that the governor's obligation was claimed, in the language of counsel, to be "exclusively federal." Here we find an assertion of the identical theory invoked by appellants in the instant case, namely, that the present defendant's alleged and supposed "duty" is that of a federal official.

The Supreme Court of the United States held, however, is unmistakable terms, that Congress may not visit federal duties upon state governors as *ex-officio* deputies of the national government. The court said at page 107:

"* * * The act does not provide any means to compel

the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. **And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.**

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word 'duty', the statesman who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, **the word 'duty' in the law points to the obligation on the State to carry it into execution.**" (Emphasis supplied.)

This case, which has never been overruled or limited, is decisive of the case at bar. It holds that even another state (not private individuals, as in the instant case) may not compel the performance of an act which an act of Congress expressly declares to be the "duty" of the governor.

In the trial court, counsel for appellants, confronted by this decision, pointed to the fact that the court did in fact

indulge in discussion of the duty of the governor and declared it to be his duty, though performance of such duty could not be compelled, to return the fugitive to the demanding state. This discussion by the court was obviously a pure *dictum*, since the reasoning which it invoked could never, according to the court's holding, be made compulsory with respect to the governor.

Counsel for appellants stated that all that he wanted in the present case was a "similar declaration" by the court in the instant case. Thus counsel in effect confessed that all that was sought was an *obiter* expression upon the merits of the question with respect of which, by their failure to ask a writ of *mandamus* or other overtly coercive relief, they virtually admitted to be beyond the province of the Federal courts.

This case is not directly decisive of any question of sovereign immunity, for the plaintiff state was herself a sovereign and might have sued Ohio in this court. But it does hold the proposition, absolutely fatal to the plaintiffs' case, that Congress cannot impose federal duties upon a state official, at least with any expectation that federal courts will or can enforce them.

The case thus affirms two principles, each of which is, independently of the other, decisive of the case at bar. It holds:

> **First**: That a suit against the Governor with respect to his official duty to perform an act is a suit against a state. Since in this case, the plaintiffs are citizens, the instant suit is in violation of Illinois' immunity, whereas the cited case was brought by a sovereign.
>
> **Second**: That Congress cannot impose federal duties upon a Governor.

Once it is perceived that Congress could not impose upon state officials the duties of federal functionaries so as to render such state officials amenable to the process of federal

courts, the plaintiffs' whole thesis as to federal jurisdiction in this case fails utterly.

Although we realize that decisions of the lower federal courts are not authoritative here, we cite as cogent in its reasoning the case of *United States* v. *Clausen* (District Court, Western District of Washington, 1934), 291 Fed. 231. In that case it was contended that a federal *war measure,* enacted during the first World War, imposed upon state officials the duty to turn over to the alien property custodian funds or property in his possession when such funds belonged to alien enemies. It was held that this act would not sustain the issuance of federal process against state officers.

In the lower court, counsel for the plaintiffs, entirely misunderstanding the relevant principles and doctrines, cited as authority for maintaining a suit against the Governor such cases as *Ex parte Young,* 209 U. S. 143, *Sterling* v. *Constantine,* 287 U. S. 378, and other cases, all of which sustained the doctrine that state officials, including Governors, **may be enjoined from illegal acts**. Of course, the *rationale* of such cases is that a state official who acts illegally, even under the purport and color of state authority, acts as an individual and private trespasser **and not in any official capacity.** The injunction is simply anticipatory of the right which the plaintiffs would have, in an action of tort, against the defendants **as private individuals** if in fact they committed the illegal acts restrained. It is an old doctrine of common law that officials who act illegally are liable in their personal capacity in tort. Therefore equity can restrain those acts which, if committed, the common law could redress. The whole doctrine is predicated upon the personal, as distinct from the official, capacity of the defendant.

But the plaintiffs do not suggest that the defendant in the instant case is sued as a private citizen. Therefore the rule that officials may be enjoined from acts of private trespass is as inapplicable as it is fundamental.

Perhaps the fallacies in plaintiffs' argument can be most incisively demonstrated by asking the following question, which admits of a categorically "Yes" or "No" answer and by indicating that, no matter whether this question be answered "yes" or "no", jurisdiction cannot exist.

1. Would the Governor of the State of Illinois be bound to abide by the decisions of the federal courts in this case, if the decision should be opposed to his view that the federal ballot is not authorized by the State of Illinois?

If the answer to the above question is "Yes": If it is admitted that the judgment will be coercive, even if only in the sense that the Governor will be legally bound to obey it without regard to whether punitive measures could be taken against him for failure to obey it, then the suit is one to impose upon the Governor a legal obligation to obey, in respect to the conduct of the state government, the judgment of a court. It is thus clearly a suit against the State of Illinois and, moreover, is within the teachings of the *Dennison* case cited above.*

If the answer to the above question is "No": Then if no compulsion attaches to the judgment, it is not declaratory. It is merely advisory or hortatory. If it is the duty of the Governor to interpret the law of Illinois as he understands it and not as the court understands it, then the proceeding seeks, not a declaratory judgment at all, but a mere *dictum*.

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* It is interesting to note in passing that in their brief in the Circuit Court of Appeals, counsel answered this question, phrased previously as it is phrased here: "Legally, no. Morally, yes." This answer evinces counsel's complete misconception of the matter. Once it is admitted that no legal duty to obey exists, all purpose of legal proceeding is at an end. The plaintiffs thus confess that they seek nugatory *dicta*.

Moreover, the view that the Governor would be "morally" bound to follow the view of the court is not only irrelevant, when counsel excludes the purely "moral" from the domain of the legal, but is arrant nonsense. Of course a Governor who has taken an oath to support the Constitution has no moral right to abdicate his own honest conviction and substitute for that conviction the judgment of an equally honest court. If coerced by *mandamus*, he obeys a legal, not a moral, command. Absent legal compulsion, his own conscience, not that of a court, must be his moral or ethical preceptor.

II.

If it could be supposed that the Governor is not sued as a representative of the State of Illinois, then, even apart from any question of sovereign immunity, the instant proceedings would be nugatory for want of party or parties representing the State of Illinois.

The plaintiffs, realizing that the State of Illinois is immune to suit, disclaim any impleader of the Governor in his official capacity as such Governor and profess to sue him only in the character which they impute to him as *ex-officio* a functionary of the federal government.

We earnestly submit that the considerations developed under the preceding Point demonstrate conclusively that no such capacity can or does exist, that the suit is necessarily one against him in his capacity as Governor, that it seeks an adjudication of his duties as such Governor and that therefore is in effect a suit against the State.

However, under the present Point, we assume, *ex gratia* and for the sake of argument only, that, in some way or other, the Governor can be sued neither as a private citizen nor as Governor of the state but as a *quasi* official of the federal government. The plaintiffs admit that they cannot compel him, in any capacity whatever, to make the certification here sought. But they seek a declaration to the effect that the actual certification is unimportant and that, if the court determines that he should certify, then that judicial determination may take the place of the actual physical act of certification. (*See prayer of plaintiffs' complaint*, par. G, Tr. 22-23.)

Let us repeat that, for the sake of argument only, we assume under this Point that the defendant is not sued as the Governor of Illinois.

If that be so, then neither the State of Illinois nor any

representative of its government nor any of its officers are, in their official capacity, before the court. Even the defendant, upon this supposition, is not before the Court as Governor of the State. If this be so, a judgment declaring that in a *state* election, the conduct of which is administered by *state* officials, a certain ballot can be used, would be void because the government and the parties upon whom such a judgment must operate, if it could operate at all, would never have been impleaded or given a chance to be heard.

Here again the plaintiffs have impaled themselves upon dilemma that can be exhibited by the following question: Is it intended to bind state election officials, including the defendant as Governor and a state official and not merely as a federal functionary, by the judgment sought in this case?

If the answer to the above question is "Yes": Then the suit is not only forbidden by the doctrine of sovereign immunity (See Point I, *ante*), but even if all considerations of sovereign immunity be ignored, the judgment will still be a nullity because, according to the logic of the plaintiffs, the defendant is not sued as a Governor or representative of Illinois; no other representative of Illinois is sued; Illinois has not been sued and has not appeared and therefore, apart, we repeat, from questions of sovereign immunity, the declaratory judgment would not be binding upon the very persons whom it must bind if it is to be effective, that is, state officials who have not been impleaded. This consequence would not be the result of sovereign immunity by of failure to implead any representative of the State or its electoral agencies.

If the answer to the above question is "No": Then the suit seeks not a declaratory judgment, for it binds no one and will settle nothing, but is purely an advisory or hortatory judgment. The proceeding therefore presents no case or controversy. (See III, immediately *post*.)

III.

Unless this proceeding contemplates a binding adjudication as distinct from a mere pronouncement, it presents no "case or controversy" within the purview of the consitution. This is true even though it is a suit for declaratory judgment.

It is quite evident that counsel for the plaintiffs appreciate fully the most delicate exiguity of their theory in this case.

In order to avoid the inevitable result of dismissal of their suit for violation of Illinois sovereign immunity, they seek so far to attenuate the effect of any judgment which might be pronounced in this case as to relieve it of the force of an assault upon state sovereignty. But if the judgment is to have no vigor, then it is not a judgment at all; and the cause ceases to present a "case or controversy."

Plaintiffs' counsel try to navigate the straits between the shoals of state sovereignty and the whirlpool of "no controversy" by asking the court to impute some sort of compulsion, legal or moral, to the judgment, which compulsion shall be sufficient to relieve the judgment of the purely "advisory" character of which this court said in *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, would render the matter not a case or controversy, and yet not enough compulsion to make the judgment an attempt to bind the state and therefore void as in violation of sovereign immunity.

We say that is logically impossible to admit that a judgment in this case could have no binding effect upon state officials who disagree with it, without admitting that no case or controversy is presented; but that once it is maintained that the judgment would be operative upon state officials, then the suit is one to determine the rights of the state with respect to the conduct of elections and is forbidden by the doctrine of sovereign immunity.

TO THE EXTENT THAT A JUDGMENT WOULD BIND STATE OFFICIALS WITH RESPECT TO AN ELECTION CONDUCTED BY THE STATE GOVERNMENT, THE JUDGMENT WOULD INFRINGE SOVEREIGN IMMUNITY; TO THE EXTENT THAT IT DID NOT BIND THEM, IT WOULD BE NO JUDGMENT AT ALL; FOR A JUDGMENT IS, BY NATURE, A BINDING ADJUDICATION.

We call the court's attention to the following consideration as clearly indicating the extremity to which the plaintiffs are forced:

The plaintiffs do not seek any writ of mandamus against the defendant. They would, of course, seek such a coercive writ if the logic of their position would permit, but they recognize that a writ of mandamus will not lie against the defendant *if he is sued as Governor.*

Now if, as they seek ingeniously to contend, he is not sued as Governor at all but is sued as a federal official, there is no reason why a writ of *mandamus* will not lie. But actually to ask a coercive writ against the defendant, who is the Governor of the State of Illinois, when the purpose of such writ would be to control an Illinois election would make it obvious to any court that the defendant is in fact sued as a Governor and not as a state official despite the plaintiffs' protestations to the contrary. The failure to ask a writ of *mandamus* can be interpreted only as a tacit but nevertheless most significant recognition that the subject matter of this cause is not one for federal adjudication and remedial process. How, then, can the federal courts be invested with jurisdiction merely because remedial process is not sought?

In short, we contend that the plaintiffs have admitted that they could not maintain this suit if they asked remedial process. But failure to ask such a process does not change the character of the controversy. It merely changes the character of the relief sought.

In the *Aetna Life Insurance Company* case, 300 U. S. 227, this court made it clear that, although a declaratory judgment need not contemplate the immediate issuance of process in execution or enforcement thereof, nevertheless it must so bind and conclude the parties as to be effective as *res judicata* in later proceedings. Now there can be no later proceedings in which the plaintiffs can claim the effect

of any judgment here rendered, for no one suggests any rights which could be asserted against the defendant if he disobeyed the order, even if a judgment should be rendered favorably to the plaintiffs and the defendant disobeyed it. *A fortiori,* no other election official would have to obey it.

We take it to be an axiom that courts will not make decisions that they cannot enforce. The defendant, should the court decide the substantive political question here involved adversely to his views, would find himself in the position of having a firm conviction, unchanged by the Court's pronouncement, as to where his duty lay under the federal act. Should the Governor voluntarily obey the judgment out of deference and respect to the court, he would be abdicating his own discretion and responsibility. Should he refuse to obey the decision, abiding by his own convictions, instead of the advice contained in the judgment, the court would be in the position of having done a vain thing and having rendered an opinion which it was impotent to enforce.

This court will have no difficulty in envisioning the consequences which will ensue if courts declare their ideas as to the duties of other branches of the government, or as to the officers of other sovereignties, when they may not enforce compliance with those ideas. They will act as counsellors to executive officers, not judges pronouncing judicial commands or even conclusive determinations.

IT IS THE EARNEST POSITION OF THE DEFENDANT THAT THE MATTERS DISCUSSED UNDER THE FOLLOWING HEADING ARE NOT BEFORE THE COURT AND CANNOT PROPERLY BE CONSIDERED. THIS MATTER IS INSERTED FOR REASONS HEREAFTER STATED.

IV.

The complaint utterly misconceives the intent of the Soldiers' Voting Act.

In the Introduction to the present Argument, we earnestly insisted that the only issues before the lower court were questions of jurisdiction, that the defendant's pleadings did not raise any question on the substantive merits, that the only possible judgments upon a motion to dismiss for jurisdiction were either a judgment sustaining the motion and dismissing the cause, or a judgment in the nature of *respondeat ouster*, and that this case is not within the rule that a reviewing court may in its discretion consider questions presented to but not passed upon by lower courts because in this case the merits were not presented to the lower courts by the pleadings.

But since the plaintiffs have devoted the entirety of their brief to the substantive merits, with no discussion of the jurisdictional questions, and since, in our earnest view, the plaintiffs' contentions are absolutely destitute of even the slightest merit, we venture the following brief reply to their arguments on the substantive questions.

Section 302 of the Act in question is as follows:

"APPLICATION OF THIS TITLE."

"SEC. 302. (a) Subject to the provisions of subsection (b), the provisions of this title shall apply with respect to the following:

(1) Members of the armed forces and the merchant marine of the United States, outside the United States.

(2) Persons serving with the American Red Cross, the Society of Friends, the Women's Auxiliary Service Pilots, and the United Service Organization, outside the United States who are at-

tached to and serving with the armed forces of the United States.

(3) Members of the armed forces, inside the United States."

"(b) The provisions of this title shall apply to, and the ballot provided for by this title may be used by—

"(1) an individual referred to in paragraph (1), (2), or (3) of subsection (a), if he is a citizen of a State whose Governor **has certified, prior to July 15 of the year in which the election is to be held, (A) that such State has made no provision for procedure which will enable the citizens thereof to whom subsection (a) applies to vote by State absentee ballot, and (B) that the use of ballots provided for by this title is authorized by the laws of such State;**"

"or (2), an individual referred to in paragraph (1) or (2) of subsection (a), **if he is a citizen of a State whose Governor has certified, prior to July 15 of the year in which the election is to be held, that the use of ballots provided for by this title is authorized by the laws of such State, even though** the Governor thereof does not make the certification referred to in clause (A) of paragraph (1), but only if such individual states in his oath that, prior to September 1, he made application for a State absentee ballot but, as of October 1, has not received it." [Emphasis added.]

"No individual who is not included under paragraph (1) or (2) of this subsection shall be entitled to use, or be furnished, a ballot under this title. Certifications referred to in this subsection shall be made to the Commission."

The prerequisite to the use of the federal ballot is, according to the deliberate and unmistakable language of Congress, the **governor's certificate** either (1) that the state has made no provision for procedure which will enable the servicemen to vote or (b) that, notwithstanding such provision, "the use of ballots provided for by this ballot is authorized by the laws of such state."

Let it be noted that it is not the fact, **but the governor's determination and certification of the fact prior to July 15,** which is made decisive by the act of Congress.

The reason for this language is not far to seek. The extent to which Congress could supersede state election laws was regarded as highly debatable by constitutional authorities. The extent to which Congress **should**, even if it could, supersede state election laws was, as this court knows perfectly well, a most delicate issue in Congress. There can be no doubt—none whatever—that it was the purpose of Congress to confide the power to decide this question to the governor of the several states. The act does not contemplate a federal decision of the question, whether that decision be made by federal courts, federal executive agencies or even Congress itself.

To hold that the governor is subject to the jurisdiction of federal courts would be to frustrate the unmistakable intent of Congress.

The court is not called upon to consider whether Congress might, if it chose, provide for a federal ballot, not for the election of members of Congress but also for presidential electors, notwithstanding the fact that the use of such ballots might not be authorized by the laws of the state, because Congress has explicitly and unmistakably declared that, whatever may be the extent of its powers, it did not wish to exert them unless the **governor of the state** should certify either

> "(A) that such State has made no provision for procedure which will enable the citizens thereof to whom subsection (a) applies to vote by State absentee ballot, and (b) that the use of ballots provided for by this title is authorized by the laws of such State;"
>
> *or*
>
> "that the use of ballots provided for by this title is authorized by the laws of such State;"

although in the latter event, the ballots can be used "only if such individual states in his oath that, prior to September 1, he made application for a State absentee ballot but, as of October 1, has not received it."

It is manifest that Congress, whether restrained by constitutional considerations or by a sense of the extreme delicacy of the question of state *versus* federal control of elections even apart from constitutional limitations, left the determination and certification of this fact to the chief executive. The act does not contemplate that the determination shall be made by a federal court.

Conclusion.

For the reasons urged in the foregoing brief and argument, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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